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From the Information Policy Analysis Division

Opinion Highlights

The following are highlights of recent Commissioner of Administration advisory opinions. All Commissioner's opinions are on the IPAD web-site at www.ipad.state.mn.us.

04-024: A parent asked whether School District 77, Mankato, violated his/her child's rights as a data subject by including a photograph and name identification of the child on the yearbook page apparently dedicated to special education programs. The Commissioner opined that the District did not comply with Chapter 13 when it disclosed data about the child. The Commissioner noted that the District's directory information policy was not specific enough to allow parents to make informed choices about whether or not to opt out of allowing the District to release certain not public data.

04-025: The City of Excelsior inquired whether a spreadsheet it created, detailing revenues received from parking violations, is protected as an internal competitive proposal under section 13.37, subdivision 2(e). An internal competitive proposal is defined as "a proposal to provide government services that is prepared by the staff of the political subdivision in competition with proposals solicited by the political subdivision from the private sector." Because Excelsior was considering a proposal from Deephaven, which is not a private sector entity, the Commissioner determined that section 13.37, subdivision 2(e), did not apply and that the revenue spreadsheet is public pursuant to the general presumption.

04-031: The *Shoreview Press* asked whether the Ramsey County Sheriff's office had complied with Chapter 13 by re-

fusing to allow a reporter to review the forms or documents on which public response or incident data are recorded. Although the Commissioner was unable to determine whether the Sheriff's office refused to allow reporters to review the forms or documents, the Commissioner stated: If a reporter has made an appropriate request pursuant to section 13.03, subdivision 3, the Sheriff's office must provide the requestor with access to the actual physical data, unless section 13.82, subdivision 16, applies.

04-032: An individual asked whether School District 700, Hermantown, had complied with Chapter 13 in responding to her request for copies of her time sheets. The Commissioner opined that the District did not comply because it did not, within ten working days, communicate clearly that the time sheets did not exist or provide access to the requested data.

04-037: The City of Winsted asked about the classification of data it maintains relating to an employee who is subject to the U.S. Department of Transportation's (DOT) drug and alcohol testing regulations. The Commissioner opined that data relating to the DOT drug test, which the City is required to maintain pursuant to 49 C.F.R. § 382.401, are not public pursuant to 49 C.F.R. §382.405. The Commissioner also opined that during an open post-discharge hearing, the City may disclose drug test related data to decision makers (the City Council) without the employee's written consent.

Opinion Highlights
Please see Page 5

Legislative Update

In the waning hours of the 2004 Legislative session, the House and Senate passed an omnibus data practices bill.

The conference committee that reviewed the provisions adopted those that were identical between the two houses, those where there was substantial agreement and a few provisions that were present only in one bill.

The changes are mostly without controversy. Of note for public employers and employees, the city and county of residence of public employees will be private after August 1, 2004.

The legislation can be found in 2004 Session Laws, Chapter 290 or House File 2087 (available at www.leg.state.mn.us/leg/legis.asp by entering "HF2087"). What follows is a summary of the law's provisions. All changes are effective August 1, 2004, unless otherwise noted.

Section 1 adds a subdivision to section 13.03 and makes court pleadings served by or on a government entity public to the same extent that the data would be public if filed at the courthouse.

Section 2 relates to insurance claims data held by Minnesota service cooperatives working with school districts and other political subdivisions. The provision classifies the claims experience data as nonpublic data not on individuals. This language codifies a temporary classification of data.

Section 3 provides a cross-reference to the statute that classifies data held by the birth defects information system.

Section 4 amends section 13.43, subdivision 2 to reflect the amendments in Section 5 and to make public employees' city and county of residence private.

Section 5 applies to state correctional and secure treatment facilities. It specifically authorizes the administrators of these facilities to withhold personnel data when the administrators reasonably believe that the data will be used to harass, intimidate or assault employees.

Section 6 also codifies a temporary classification of data. It amends section 13.44 to make appraisals of personal and intangible property nonpublic until either (a) a purchase agreement is entered into; or (b) the parties negotiating the transaction exchange appraisals.

Section 7 makes changes to section 13.46, subdivision 1 by adding references to temporary assistance for needy families and the child care assistance program.

Section 8 makes changes to section 13.46, subdivision 2 to make language match current programs and agency names.

Section 9 amends subdivision 7 of section 13.46 to add language concerning the sharing of mental health data. Paragraph (c) authorizes the sharing of mental health data with law enforcement officers when they are involved in an emergency with an individual. Only the

minimum amount of data necessary to respond to the situation can be shared and law enforcement is required to keep track of the data requested and received. The record in the hands of law enforcement is classified as private data on the individual and law enforcement must inform the individual that mental health data were obtained.

Paragraph (d) authorizes the sharing of data by a mental health provider in response to a request from the Criminal Mental Health Court.

Both provisions need to be read in conjunction with the HIPAA regulations promulgated by the federal Department of Health and Human Services (see 45 CFR parts 160 and 164).

Section 10 classifies data related to legal nonlicensed child care providers selected by families receiving child care assistance as private by referring to section 119B.02, subdivision 6.

Section 11 amends section 13.47 to change the agency's name from "department of economic security" to "department of employment and economic development."

Section 12 modifies section 13.51 so that data provided to political subdivisions about income properties will remain private or nonpublic. The language in the 2003 version of this section made some data public after the passage of a period of time.

Section 13 adds a subdivision to section 13.51 to require that when a requester asks for income property assessment data as part of litigation, the requester must notify the recorded owner of the property of the request.

Section 14 amends the section containing cross-references to data held by what is now called the Department of Employment and Economic Development (DEED).

Section 15 is a cross-reference to data maintained by the Department of Natural Resources (DNR) about the specific locations of certain animals and plants.

Section 16 authorizes law enforcement agencies to provide free copies of police reports concerning domestic abuse or violation of an order for protection to the victim of domestic abuse or the victim's attorney. (See also section 37.)

Section 17 is a cross-reference for the classification of mental health data held by law enforcement officers.

Section 18 amends the Open Meeting Law, Minnesota Statutes, Chapter 13D. Specifically, the amendment authorizes the closure of a meeting to receive security briefings and reports and other related topics. Financial matters related to security issues must be discussed

Legislative Update

Please see Page 4

Advice From the Swamp Fox*

**Francis Marion, "the Swamp Fox," was a colonial officer from South Carolina in the Revolutionary War renowned for hiding in swamps while carrying out guerilla warfare against the British.*

Dear Swamp Fox:

I am the responsible authority for Boomtown. Until the last few years we have been a small, quiet outer-suburban city. Our population is increasing rapidly and some long-time residents are getting upset about aspects of the new development that is happening. They have started asking our city clerk all kinds of questions and are taking up a lot of her time. For example, Mr. Lumberjack recently wanted to know whether anyone who was granted a variance from the city's zoning code in 2003 is related to the mayor or any city council member. Do we have to spend all the time it takes answering questions like these?

Signed: Harried Responsible Authority

Dear Harried Responsible Authority:

Thank you for writing about an issue we are hearing about a lot. As you are aware, government entities must respond to requests for government data. However, under the Data Practices Act, the rights of individuals and the duties of government entities relate only to existing government data. Chapter 13 does

not require government entities to create new data or to provide existing data in a format that is different from the format in which the data are maintained. Furthermore, an entity is not required to respond to questions in which the individual does not ask either to inspect or to acquire copies of government data.

Strictly speaking, Mr. Lumberjack's question is not a data practices request under Chapter 13 because he did not ask either to inspect or to obtain copies of government data. If, however, Mr. Lumberjack had asked to inspect all data that document the disposition of variance requests, his inquiry would have constituted a data practices request and you, the responsible authority, would have been obligated to provide him with access to all data responsive to his request.

When you receive the kind of inquiry you describe, it is important to determine at the outset whether it is a request for data that are maintained by the city. If you determine that a person is asking a question rather than requesting access to data, it would be helpful to tell the individual that, under Chapter 13, the city is required to respond only to requests for access to existing data.

IPAD staff members are available to help you understand your obligations to respond to specific requests; contact information is located on Page 5 of this issue.

The Swamp Fox

Court Case Update

In an unpublished opinion, filed on May 4, 2004, the Minnesota Court of Appeals discusses, in part, the obligations of government entities in appointing a responsible authority. The responsible authority for an entity is the individual responsible for the collection, use and dissemination of the data maintained by the entity.

In *Feehan v. City of St. Mary's Point*, File No. CO-01-6519, the Court reviews provisions of Chapter 13 that relate to the appointment and duties of the responsible authority. Focusing on the appointment of a responsible authority by the City, the Court states, "Considering the language of the statute, it is clear and unambiguous on its face that data collected and held by all state agencies and political subdivisions are accessed through a responsible authority who is expressly *designated* as such either by law, the commissioner, or a governing body." [Emphasis in the original.]

The Court discusses the provisions related to the responsible authority as part of its resolution of a request for attorneys' fees as sanctions in a case involving the Minnesota Government Data Practices Act.

Any government entity that has not yet designated a responsible authority is advised to review the requirements relating to the appointment and functions of a responsible authority and to carry out the appointment. Relevant requirements are summarized and cited in the document, *Minnesota Government Data Practices Act: Compliance Checklist*, at www.ipad.state.mn.us/docs/checklist.doc. Advisory forms for appointing a responsible authority can be found at Minnesota Rules, section 1205.2000. A link to the Rules is provided at www.ipad.state.mn.us.



Legislative Update

Continued from Page 2

and decided at an open meeting and there are requirements relating to what must be disclosed before the meeting is closed and how long tape recordings of the closed meeting must be kept. The language was effective May 30, 2004.

Section 19 amends section 38.04 to make it explicit that reports of a county agricultural society are public.

Section 20 amends section 45.027 by removing a limitation on what the Commissioner of Commerce can disclose to a national securities exchange or a national securities association.

Sections 21 and 22 add the National Association of Securities Dealers to the list of parties that can receive information about insurance companies that have been examined by the Commissioner of Commerce (amendment to sections 60A.03, subdivision 9 and 60A.031, subdivision 4).

Section 23 defines a new type of data – “specific location data.” These data, maintained by the DNR, would enable people to locate protected wild animals or endangered, threatened, or special concern plants or animals. The new section, 84.0872, classifies the specific location data as nonpublic if disclosure would satisfy one of three criteria. If access to the data is denied, the Commissioner must provide a written explanation for the denial. The Commissioner may also disclose the data in certain circumstances.

Section 24 amends section 199B.02, subdivision 6, and directs that data held by the welfare system pertaining to legal nonlicensed child care providers selected by families receiving child care assistance be treated in the same way that data about licensed providers are treated in section 13.46, subdivision 4.

Sections 25 through 29 amend existing law that created a birth defects information system. The changes to section 144.2215 specify the duties of the Commissioner of Health; direct how data about children with birth defects can be transferred from a health care provider to the Department or to other information repositories. Additional sections classify the data in the system as private and detail how a parent can opt out of the information system. Transfers to other government agencies and to research entities are also covered. These sections are effective on receipt of a federal grant to establish the system.

Section 30 amends section 144.335, subdivision 3a (the Medical Records Act) to authorize the release of mental health data held by a private provider to law enforcement in an emergency situation.

Section 31 amends section 268.19 covering programs administered by DEED (unemployment insurance, assistance in obtaining employment, etc.)

Section 32 authorizes the Commissioner of DEED to

disseminate an employer’s name, address and unemployment insurance processing agent information to administer the Minnesota Unemployment Insurance Program.

Section 33 changes section 270B.01 by amending the definition of “Minnesota tax laws.” This change was effective May 30, 2004.

Section 34 is also an amendment to a Department of Revenue provision, specifically section 270B.12, subdivision 9. The new language authorizes the Department to verify to a county assessor whether an individual who is requesting homestead status has filed a Minnesota income tax return. This change was effective May 30, 2004.

Section 35 amends section 270B.12, subdivision 13, authorizing the Department of Revenue to give a county assessor the names and addresses of applicants qualified to receive a class 1b property tax classification. This change was effective May 30, 2004.

Section 36 amends section 270B.14 that authorizes disclosures between Revenue and DEED. Most of the changes are to reflect DEED’s new name.

Section 37 relates to the change made in section 16 regarding free copies of domestic abuse reports for victims and their attorneys. This amendment to section 629.341, subdivision 4 was effective May 30, 2004.

Section 38 extends the life of the domestic fatality review team in Hennepin County to December 31, 2006. This pilot project is reviewing records of all domestic fatalities and will provide a report to the Legislature no later than January 15, 2007.

Section 39 repeals sections 13.319, subdivision 7 and 13.475.

The Governor also signed SF 2114/2004 **Session Laws Chapter 276** that adds another basis on which an open meeting may be closed. The amendment to section 13D.05, subdivision 3 permits a public body to close a meeting to (1) determine the asking price for real or personal property to be sold; (2) review confidential or nonpublic appraisal data; or (3) develop or consider counteroffers for the purchase or sale of real or personal property.

Before the meeting is closed, the public body must specifically identify on the record the particular real or personal property that is the subject of the meeting. The proceedings must be tape-recorded and the recordings preserved for eight years. The tapes are accessible to the public after the property has been purchased or sold or the transaction has been abandoned. If there is a lawsuit that claims that other business was discussed during the closed meeting and the content of the tapes is not accessible by the public, the procedures in section 13D.03, subdivision 3 apply. The language was effective May 29, 2004.

Data Practices Resources Available at IPAD

Ever thought it would be nice to have a quick set of resources to help with your data practices needs? Or maybe you've just been appointed as your entity's Data Practices Compliance Official and don't know where to start? How about a video or slide presentation for use in training staff about data practices? The Information Policy Analysis Division (IPAD) can help.

IPAD has many resources available in paper and electronic formats. Two PowerPoint presentations and their associated handouts are available from the IPAD website, www.ipad.state.mn.us.

The first is a basic data practices presentation that can be used for new employee orientations, expert-led group presentations or facilitated group discussions. This presentation focuses on the legal framework of data practices and is intended to be an introduction.

The second gives Data Practices Compliance Officials (DPCO) the legal framework of data practices, an overview of key provisions and lists additional resources. This presentation also will assist DPCOs in understanding their role and the differences between a DPCO and the responsible authority.

IPAD also has several videos and associated handouts available for government entities for use as training tools. Each 90-minute video presents a framework for understanding data practices and features a short general discussion of issues common to government entities. Following the basic overview, a panel of data practices experts discusses specific dramatized cases and implications for practice in several specified topic areas.

The "Administration" video is appropriate for individu-

als involved with personnel management, information systems or other general government administrative functions. "Human Services" is for individuals who deal with data regarding public assistance and social service clients. "Public Safety/Law Enforcement" provides an overview for professionals involved in the prosecution of crimes. "Public Health" focuses on persons who work in the public health field for the state, counties or cities. "Education" is for administrators, college or school board members, administrative personnel and others who work with data about district or college employees, students or teachers. These videos are available free of charge, however, IPAD is asking for reimbursement of postage costs. (The "Records Management" video is out of stock, but a few copies are available for loan; contact the IPAD office for more information.) More information on the PowerPoint presentations and videos is on the Internet at www.ipad.state.mn.us/bdptraining.html.

Several "model" documents developed by IPAD are also available: *Model Policy: Public Access to Government Data and Rights of Subjects of Data*; *The Model Educational Data Sharing/Access Policy*; *Model Informed Consent for the Release of Government Data*; and *Model Policy on Staff Notification of Violent Behavior by Students*. Copies of these documents are on the Internet at www.ipad.state.mn.us/modeldocs.html.

Additional resource materials are available under "Other Publications" on the IPAD website, including handouts on various subjects such as data classification, Tennesen warning notices and how to make a data challenge. The 42-page booklet "Preserving and Disposing of Government Data" is available electronically or in print from the IPAD office for the cost of postage. The order form and postage fee scales for the basic training videos and the booklet "Preserving and Disposing of Government Records" are on the Internet at www.ipad.state.mn.us/docs/vidorder.doc.



**Information Policy
Analysis Division**

Questions or comments?

Contact the Information Policy Analysis Division at 201 Administration Building, 50 Sherburne Avenue, St. Paul, MN, 55155; phone 800.657.3721 or 651.296.6733; fax 651.205.4219; email info.ipad@state.mn.us.

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This document can be made available in alternative formats, such as large print, Braille or audiotape by calling 651.296.6733.

For TTY communication, contact the Minnesota Relay Service at 800.627.3529 and ask them to place a call to 651.296.6733.

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Opinion Highlights

Continued from the front page

04-038: The *Star Tribune* questioned the appropriateness of copy charges assessed by the Minnesota Department of Transportation (Mn/DOT). The reporter inspected data and then requested copies of only some of the data he inspected. The Commissioner opined that Mn/DOT's copy charge can not include the cost to retrieve data the reporter inspected but did not ask to have copied. Rather, the Commissioner recommended Mn/DOT prorate the search and retrieval portion of the copy charge. The Commissioner further opined he could not determine whether Mn/DOT appropriately charged a labor rate of \$34.85 per hour.